

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Richard Blumenthal, Attorney General
of the State of Connecticut, and
the Connecticut Department of
Public Utility Control

v.

Docket Nos. EL03-123-004 and
EL03-134-003

NRG Power Marketing, Inc.

Connecticut Light and Power Company

Docket No. EL03-129-002

ORDER DENYING REHEARING

(Issued January 12, 2005)

1. In this order, we deny rehearing of the Commission's order approving a contested settlement agreement (Settlement Agreement) between Connecticut Light and Power Company (CL&P), the Attorney General of the State of Connecticut, the Connecticut Department of Public Utility Control, the Connecticut Office of Consumer Counsel (collectively, the Connecticut Representatives); the Official Committee of Unsecured Creditors for NRG Energy, Inc. and its debtor subsidiaries; and NRG Power Marketing Inc. (NRG) (collectively, the Settling Parties). *Richard Blumenthal, Attorney General of the State of Connecticut, and the Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc.*, 105 FERC ¶ 61,292 (2003) (December 18 Order). Alternate Power Source Inc. (APS) was the only party to oppose the Settlement Agreement. APS now seeks rehearing of the Commission's approval of the Settlement Agreement. As discussed below, APS has provided no basis that warrants granting rehearing, and we will deny rehearing.

I. Background

2. The Settlement Agreement filed by the Settling Parties resolved most of the outstanding issues in the captioned dockets relating to NRG's provision of wholesale service to CL&P under a Standard Offer Service Wholesale Agreement (SOS Agreement).¹ NRG's and CL&P's SOS Agreement required NRG to provide a fixed amount of energy to CL&P at a fixed price from January 1, 2000 until December 31, 2003. Shortly after NRG commenced supplying services to CL&P under the SOS Agreement, a dispute arose as to whether CL&P or NRG was responsible for New England Power Pool (NEPOOL) congestion charges prior to the implementation of standard market design (SMD) in the New England Power Pool on March 1, 2003.² That dispute concerning pre-SMD congestion charges was filed by CL&P as a breach of contract suit in Connecticut Superior Court. The case was removed to and is currently pending before the U.S. District Court for the District of Connecticut.³

3. Beginning with the implementation of the NE-SMD, a second dispute arose concerning whether CL&P or NRG was responsible for NE-SMD-related costs for congestion and losses. We set the dispute over post-SMD congestion charges for hearing in Docket No. EL03-135-000.⁴ Subsequently, Select Energy Inc., Duke Energy Trading

¹ In this order, we are describing the background of this proceeding that is relevant to APS's request for rehearing. The background of this proceeding is described in more detail in the December 18 Order, 105 FERC ¶ 61,292 at P 2-13.

² NEPOOL and ISO New England, Inc. (ISO-NE) filed a proposal to replace the design of the then-existing NEPOOL markets with Market Rule 1, commonly referred to as the New England Standard Market Design (NE-SMD). *See* New England Power Pool and ISO New England, NEPOOL Standard Market Design, Docket No. ER02-2330 (2002). The Commission approved the NE-SMD in a pair of orders issued in 2002. *See New England Power Pool and ISO New England Inc.*, 101 FERC ¶61,344 (2002); *New England Power Pool and ISO New England Inc.*, 100 FERC ¶61,287 (2002). In addition, the Commission authorized the ISO-NE to implement the NE-SMD on March 1, 2003. *New England Power Pool and ISO New England Inc.*, 102 FERC ¶61,248 (2003) (denying stay of the NE-SMD).

³ *Connecticut Light & Power Co. v. NRG Power Marketing, Inc.*, Civil Action No. 01-CV2373 (D.Ct. filed Dec. 20, 2001) (District Court Proceeding).

⁴ *See Richard Blumenthal, Attorney General of the State of Connecticut, and the Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc.*, 103 FERC ¶ 61,344 (setting the issue of the post-SMD congestion charges for hearing in Docket No. EL03-135-000), *reh'g denied*, 104 FERC ¶ 61,211 (2003).

and Marketing LLC, NRG, CL&P, and the Connecticut Representatives reached a settlement on this issue in Docket No. ER04-135-000. APS opposed the settlement. On June 28, the Commission approved that contested settlement. *Connecticut Light and Power Company*, 107 FERC ¶ 61,320 (2004).⁵

4. The Settlement Agreement at issue in this proceeding resolved all issues in Docket Nos. EL03-123-000, EL03-129-000 (excluding those matters at issue in Docket No. EL03-135-000) and EL03-134-000, as well as all disputes involving the Commission in other forums regarding the question of whether NRG must continue to provide service to CL&P under the terms of the SOS Agreement.

5. APS opposed the Settlement Agreement on the ground that, contrary to the SOS Agreement, under the Settlement Agreement CL&P assigned pre-NE-SMD congestion charges to NRG. APS asked the Commission to reject that portion of the Settlement agreement under which the dispute over the pre-NE-SMD congestion costs would be resolved in the District Court Proceeding. APS asked the Commission either to reject the Settlement Agreement, or, in the alternative, approve the Settlement Agreement subject to review of the allocation of transmission congestion charges.

A. December 18 Order

6. In the December 18 Order, the Commission found that the matters raised by APS did not warrant either rejecting the Settlement Agreement or making it subject to review of the pre-NE-SMD congestion charges. The Commission further found that the Settlement Agreement has no bearing on APS's claims concerning pre-SMD congestion charges. The Commission noted that the Settlement Agreement expressly did not disturb the litigation between CL&P and NRG over responsibility for congestion charges under the SOS Agreement before the Commission (regarding post NE-SMD congestion

⁵ APS had previously filed a complaint against Northeast Utilities System (NU) and its subsidiary, Western Massachusetts Electric Company (WMECO), raising similar issues. APS alleged that WMECO's pass-through of congestion charges and its calculation of line losses under the parties' bilateral supply agreement (the APS/WMECO SOS Agreement) violated the spirit and intent of the NEPOOL open access transmission tariff (OATT), violated the unbundling requirements of Order No. 888, resulted in discriminatory transmission pricing and constituted a discriminatory preference in favor of respondents' affiliate. The Commission denied the complaint. *Alternate Power Source, Inc. v. Western Massachusetts Electric Company*, 101 FERC ¶ 61,236 at P 7-8 (2002), *reh'g denied*, 104 FERC ¶ 61,255 at P 10 (2003) (WMECO), *aff'd sub. nom. Alternate Power Source, Inc. v. FERC.*, No. 03-1398 (D.C. Cir. November 23, 2004) (unpublished decision).

charges)⁶ or the litigation pending in the District Court (concerning pre-NE-SMD congestion charges).⁷ The Commission concluded that the Settlement Agreement does not impact, directly or indirectly, which party is responsible for pre-NE-SMD-related congestion charges, and, as a result, the settlement agreement does not prejudice APS's ability to pursue claims concerning its contract with WMECO. The Commission further found, that insofar as APS is challenging in this proceeding the Commission's determination with regard to its complaint against WMECO, APS is making an impermissible attack on a final Commission order.⁸ The Commission concluded that APS had not raised any genuine issue of material fact concerning the Settlement Agreement and that the Settlement Agreement represents a reasonable resolution of the matters at issue in this proceeding and is in the public interest.

B. APS's Request for Rehearing

7. On rehearing APS argues that the Commission erred in relying on the SOS agreement to determine the allocation of pre-SMD congestion charges and that the only relevant agreement on this issue is a separate transmission service agreement.⁹ APS argues that CL&P had no right to allocate congestion charges to NRG in the SOS Agreement. APS further suggests that the Settlement Agreement unnecessarily forces NRG to dispute the contractual allocation of congestion charges in the District Court Proceeding and that there is no need for the District Court to reach these issues if the Commission addresses them. On rehearing, APS asks the Commission to find that CL&P (in the SOS Agreement with NRG) violated the transmission service agreement, the NEPOOL and NU OATTs, and the Commission's regulations in allocating the pre-SMD congestion charges to NRG. APS also argues that the Commission erroneously concluded that APS was making an impermissible collateral attack on the Commission's WMECO orders.

II. Discussion

8. The Commission decided that the District Court should address the CL&P/NRG pre-SMD congestion charge issue on June 25, 2003, and reaffirmed that decision on

⁶ See n.4 *supra* and accompanying text.

⁷ See n.3 *supra*.

⁸ December 18 order at P 16.

⁹ APS maintains that it has raised a material fact that requires a hearing by referencing the service agreement.

rehearing.¹⁰ APS did not appeal that decision to a U.S. Court of Appeals and may not raise the issue again here. In any event, nothing raised by APS warrants granting rehearing of our December 18 Order. The Settlement Agreement provided that the contractual dispute concerning pre-SMD congestion charges was not covered by the Settlement Agreement but would be determined in District Court. APS has not presented any persuasive reason why the District Court should not decide the pre-SMD congestion charge issue.

9. APS does not argue that District Court does not have jurisdiction over the dispute. Instead, APS claims that by arguing that a transmission service agreement rather than the SOS agreement is the relevant contract for determining who is responsible for pre-SMD charges, APS has raised a material issue of fact that the Commission must resolve.

10. The transmission service agreement APS raises does not present a material issue of fact and is irrelevant to the Settlement Agreement at issue here. The transmission service agreement has no bearing on whether to approve the Settlement Agreement because the Settlement Agreement does not address the pre-SMD congestion charge issue, other than saying that the issue will be decided in District Court. The pre-SMD congestion charge issue has not been settled. In these circumstances, nothing raised by APS on rehearing warrants changing our conclusion that the Settlement Agreement was a reasonable resolution of the dispute and is in the public interest. We, accordingly, will deny rehearing.

The Commission orders:

APS's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁰ See n.4 *supra*.